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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 721

JEWELL RIDGE COAL CORPORATION, a Corporation, *Petitioner*,

v.

LOCAL NO. 6167, UNITED MINE WORKERS OF AMERICA, an Unincorporated Association, Affiliated with the International Union, United Mine Workers of America, et al., *Respondents*.

REPLY BRIEF FOR PETITIONER

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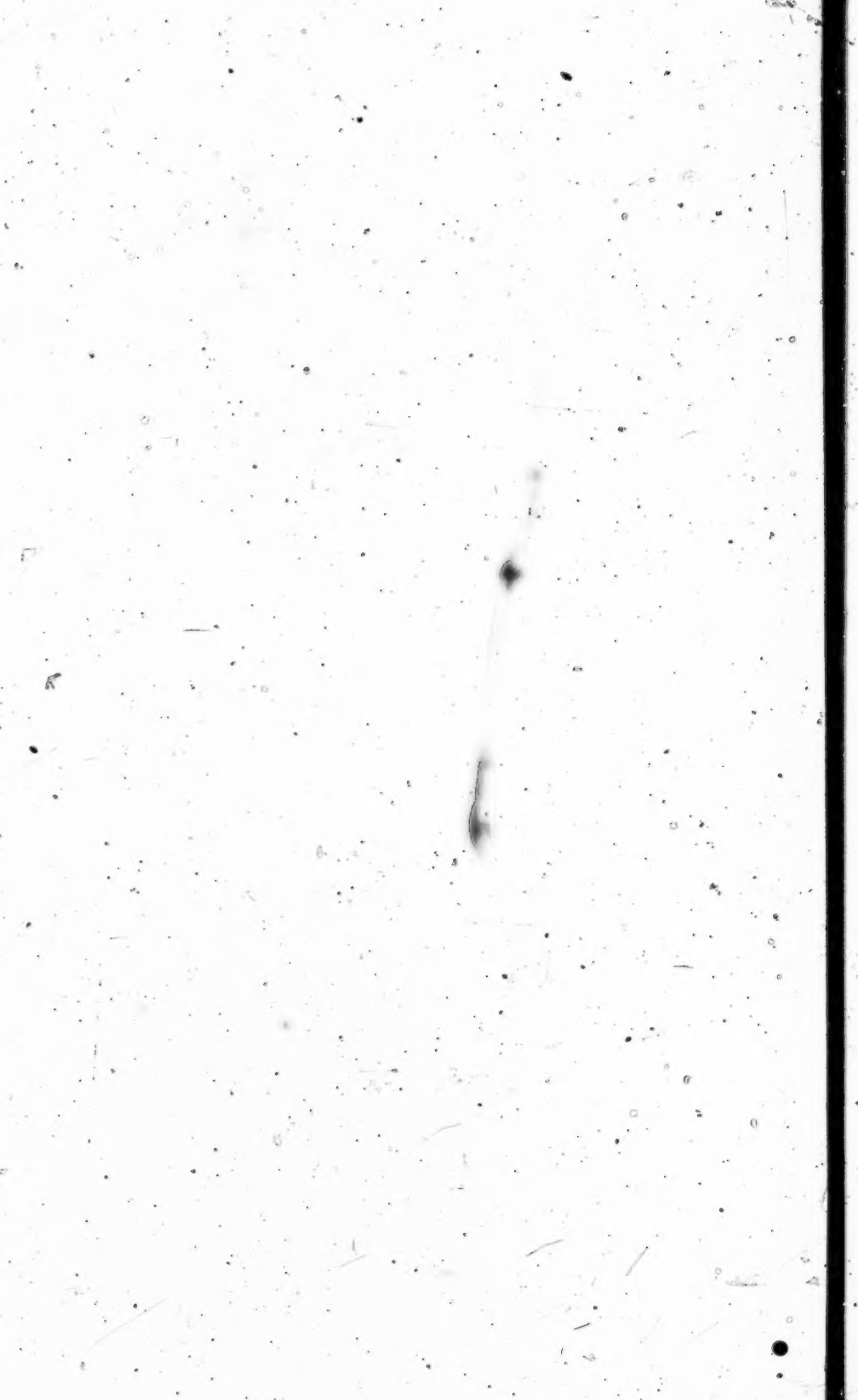

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Much of respondent's brief is composed of statements which are in conflict with the District Court's findings of fact. We mention some of these.

1. Petitioner's Underground Employees Do Not Report for Work at the Portal of the Mine.

Respondent's assumption that the men " were required to report, and did report, for work **at the portal**" (Br. 12), ignores the contrary testimony, and the contrary finding of the District Court (Petitioner's Br. p. 24). Petitioner's underground em-

ployees were required to report for work, and did report therefor, at their usual working places.

2. The "Surrender of Their Will" by Employees in Underground Travel is Not an Effective Test.

Respondent says that when "the employees **reported** at the portal, they had surrendered their will to the will of the master" (Br. p. 12), and concludes from that premise that the line of demarcation between non-work and work is located at the portal. This supposed test is indecisive and irrelevant. Respondent made the same contention before the District Court. On this point the court said:

> "In this case, more than 400 employees travel from their homes to the mines in trucks and buses operated by the company. If they are entitled to pay for the time spent in traveling from the portal of the mine to their usual places of work, might it not also be contended that they are entitled to pay for the time spent in travel from the points where they board the trucks and buses to the mines? If "surrender of freedom of action" be any criterion, as contended by defendants' council, do not these employees surrender their "freedom of action" when they become passengers on plaintiff's vehicles?" (App. pet. 72-3, 53 F. Supp. 950).

It is true that while on the mantrip the miner is required to abide by certain regulations of mining law looking to safety of travel (if he is one of those who walk in, he does not), but it is equally true that on the highway before reaching the mine, he must abide by corresponding regulations. If he must "sit in the mancars on the opposite side from the trolley wire" (Br. p. 19), he also has no choice as to the side of the highway on which he will drive or will walk. If the speed of the mantrip is regulated (Br. p. 19), so is the speed of the vehicle on the highway. If he were to travel by rail-

way to the portal, he would be subject to the laws governing the conduct of passengers on trains and enforced by the conductor. There is no essential or thoroughgoing difference between surrender of liberty of action on the highway, railway and mantrip. All three are imposed by the public authorities with a view to safety of travel. Neither is a test of work time under the act.

3. The Hazards of the Coal Mining Occupation are Irrelevant.

Respondent emphasizes the hazards of underground coal mining (Br. pp. 15, 24-6), but ignores the fact that **underground travel is not coal mining.** The dangers of underground travel are slight, as the District Court found (Petitioner's Br. pp. 27, 64). The hazards encountered at the working places, whether great or slight, are irrelevant.

4. This Court Did Not Intend the General Language Which It Used in the Muscoda Decision to Apply to the Present Case.

Respondent says that "we can assume . . . . . that this Court had in mind the Coal situation when it rendered the opinion in the ore case," and says that this Court used the general language quoted by the Circuit Court of Appeals and interpreted by it as dictating its decision, "with that (i. e. the coal situation) in mind" (Br. p. 17). Change of front is characteristic of respondent's case. The employees' position throughout the **Muscoda Case**, as presented by senior counsel for the Union here, was that "we are not trying the case of coal miners" (Pet. pp. 18, 70, 53 F. Supp. 935, 948). In the **Muscoda Case**, the iron ore miners objected to the admission of testimony relative to "the coal situation", and were sustained by the District Court. That ruling was approved by this Court which said that the District Court "properly

directed its attention solely to the evidence concerning petitioner's iron ore mines and disregarded the customs and contracts in the coal mining industry" (app. pet. p. 140). Having succeeded in its contention in the **Muscoda Case** that "the coal situation" should not be considered, counsel can hardly now be heard to argue that the general language of this Court in that decision was used with the present case "in mind."

5. The Union's Attempted Change of Front Puts All of the Equities Against It.

Respondent insisted, during the legislative consideration of the Act, and at all times thenceforward, to August, 1943, when the National War Labor Board disapproved the first Illinois Supplemental Agreement, that the contract definition of the working day met the requirements of the Act (pet. pp. 30-4, petitioner's br. pp. 44-6) — "we believe that your division should accept . . . the definition of working time . . . as complying both with the provisions of the Fair Labor Standards Act and of Interpretative Bulletin No. 13" (Houck Letter, app. pet. p. 53, 53 F. Supp. 941). Respondent considers this reversal of a long standing and strongly held position an "unimportant circumstance" (Br. p. 14), and says that petitioner does not "claim that the inconsistent position caused any loss or damage to petitioner" (Br. p. 15). Respondent, in making this statement, overlooked our discussion of this point (Pet. pp. 7-8, 37-39, petitioner's br. pp. 75-6). It is beyond understanding that respondent should attempt to deny that petitioner's reliance upon the concurring views of all parties concerned—the Union, the Administrator, the operators—as to the correct construction of the Act upon the present point, has resulted in accumulation of the immense potential liability with which petitioner would be confronted if the Union were to succeed in its present contention.

It is not to be overlooked in consideration of the equities of the case and of the shocking consequences which would result if the Union should be sustained, that the Union has nowhere in its brief sought to explain or excuse its change of front. The facts, and the inferences therefrom drawn by the District Court (app. p. 34), are conceded. They are dismissed with the single remark that they were "unimportant circumstances" (Br. p. 14). We do not believe that they will so impress the Court (pet. pp. 37-9). The position of the Respondents is thoroughly cynical. In sustaining it, the Circuit Court of Appeals has permitted a most flagrant violation of that recognized maxim of justice and fair play—'he who remains silent when he ought to have spoken will not be heard to speak when he should remain silent'.

6. O'Neill's Testimony Was Not "Impeached."

Respondent states that "we thought it sufficient impeachment of Mr. O'Neill to show that he himself had offered contracts to the United Mine workers which contained provisions for the payment of travel time" (Br. p. 18). Respondent here repeats its argument which was discussed in petitioner's brief (p. 73-4) that because the industry can operate successfully under wartime conditions of absence of competition, it can do the same under normal conditions of highly competitive operation. O'Neill in his testimony made it perfectly plain that he, like the Houck Letter, was referring to conditions of normal competition in the industry, conditions which had preceded the war and which he expeected to follow it (petitioner's br. p. 52).

Respondent, in referring to the draft agreements submitted by O'Neill's group (br. p. 18), does not mention that the circumstances were those of the Summer and Fall of 1943 when the government was in possession of the mines and the

ceiling price was high enough to permit profitable operation on a portal-to-portal basis (petitioner's br. pp. 48-9, 73-4).

Petitioner also does not mention the fact that the first draft referred to provides for a flat wage increase to all employees, whether working underground or not, "to prevent inequities and inequalities, to retain proper relation of wages to cost, and to maintain proper and existing competitive factors, marketing methods, rates **and other factors customary and inherent in the industry**" (Ex. C, R. 339, 814). The purpose of this agreement obviously was to preserve the contract definition and was the precise opposite of a portal-to-portal basis. Exhibit D. (R. 341, 816) was proposed after the Ickes-Lewis agreement had been made and placed in effect, and this draft amounted merely to a modified adoption of the Ickes-Lewis agreement. Exhibit F (R. p. 345, 826) is a draft adoption of the Ickes-Lewis agreement and is substantially the same in effect as the agreement of December 17, 1943, which was actually executed (petitioner's br. p. 49).

There is nothing in any of these drafts which can justly be said to "impeach" or in any way weaken O'Neill's testimony.

7. The Memorandum Filed In The Present Case By The Solicitor General Does Not Alter The Effect Of The Administrator's Ruling.

The Solicitor General has filed a memorandum since the filing of petitioner's brief stating that "the Circuit Court of Appeals correctly concluded that this court's decision in (the Muscoda Case) cannot be distinguished in principle from the case at bar" (Memo. pp. 1-2). The memorandum amounts to no more than a legal interpretation of the effect of the Muscoda decision. The legal interpretation had already been made by the Circuit Court of Appeals and the endorsement of the decision of the Circuit Court of Appeals by the Administrator

through the Solicitor General adds nothing to the material previously before the court. This eleventh hour change of front on the part of the Administrator is not claimed to be based upon any re-examination of the facts of underground mining, but merely upon the supposed effect of the Muscoda Case.

The Administrator erroneously states that "for more than a year now * * * the bituminous coal mines have been operating under contracts providing for payment of wages on the portal-to-portal basis". As pointed out in petitioner's brief (p. 47), the Ickes-Lewis Agreement is very far from providing a compliance with the Act upon a portal-to-portal basis. All underground employees receive pay for a uniform amount of assumed travel time, namely forty-five minutes per day, and not the actual travel time of each worker as would be required if respondent's contention is sustained. But they are not paid for this assumed amount of travel time at their "regular rate", but "at a special rate equivalent to two-thirds of the established regular hourly rate for the assumed forty-five minutes of travel time in each day" (Ex. H, R. 346, 834-5).

Respectfully submitted,

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